



THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

1000 Washington Street • Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
TTY/TDD (617) 521-7490
<http://www.mass.gov/doi>

CHARLES D. BAKER
GOVERNOR

GILBERT W. COX JR.
CHAIRMAN

KARYN E. POLITO
LIEUTENANT GOVERNOR

JOSEPH COYNE
RICHARD STARBARD
WILLIAM E. JOHNSON
LYLE M. PARE

**Minutes of Meeting of the Board held on March 1, 2017 Approved by the Board at the
April 12, 2017, Board Meeting; Motion of Board Member Richard Starbard and Seconded
by Board Member William Johnson
The Motion Passed by a Vote of: 4-0, Chairman Cox Abstained**

March 1, 2017, Minutes of Board Meeting
Held at 1000 Washington Street, Boston, Massachusetts

Members Present:

Chairman Cox
Joseph Coyne
William Johnson
Richard Starbard
Lyle M. Pare

Attending to the Board:

Michael D. Powers, Legal Counsel to the Board
Steven Zavackis, Executive Secretary

Proceedings recorded by:

Peter D'Agostino of the Alliance of Automotive Service Providers of Massachusetts (AASP) (Audio/Video). Joel Gausten of GRECO Publishing (Audio/Photography). Chris Gervais of MAPFRE (Audio/Video). Paul Harden, Hanover Insurance Company.

Call to Order:

Chairman Cox called the meeting to order.

Review of minutes:

A review of the minutes of the Board Meeting held on January 24, 2017, was taken by the Board. Chairman Cox called for a motion to approve the minutes, the motion was made by Board Member William Johnson and seconded by Board Member Richard Starbard. The motion passed by a vote of: 4-0, with Chairman Cox abstaining.

Report on the next Part-II examination for motor vehicle damage appraiser:

Board Member Richard Starbard reported that Pete Smith of MAPFRE Insurance Company and John Michael Dillon of Progressive Insurance Company assisted with the examination and thanked them for their assistance. John Michael Dillon is setting-up the next scheduled Part-II examination which will be held in Westwood, Massachusetts on April 4, 2017.

Board Member William Johnson posed a question to the ADALB Executive Secretary Steven Zavackis as to the number of appraisers whom drop from the active list of appraisers each year. Executive Secretary Zavackis responded that he did not have an exact figure, but would check with the Licensing Unit for the Division of Insurance and report back at the following Board meeting.

Proposed letter for Chairman Cox's signature to the General Counsel for the Division of Insurance requesting an update as to the status of the review of the proposed amendments to the ADALB's regulation:

At the previous meeting Chairman Cox requested Board Legal Counsel Michael D. Powers to draft a letter from the ADALB, for the Chairman's signature to the General Counsel for the Division of Insurance inquiring about the status of the review for the proposed amendments to the ADALB's regulation. Legal Counsel Powers provided the letter to the Chairman, and the Chairman signed it.

Report of request of assignment of enforcement counsel to the General Counsel of the Division of Insurance and the status of the Order to Show Cause in the matter of the Auto Damage Appraiser Licensing Board versus The Hanover Insurance Company, licensed appraisers James Steere, and Paul Horton:

Scott Peary, Chief Enforcement Counsel, of the Division of Insurance appeared before the Board and informed the Board that he would be the prosecuting attorney or enforcement counsel for the matter. He said that he reviewed the Order to Show Cause and in his opinion so much of it that made reference to M.G.L. c. 176D is vested in the commissioner for the Division of Insurance and, therefore, the ADALB did not have jurisdiction under Chapter 176D. Consequently, Mr. Peary amended the Order to Show Cause removing so much of it that pertained to Chapter 176D and submitted copies of his proposed Order to Show Cause to the Members of the Board for their review.

Board Member William Johnson declared that he wanted to get things started at the meeting today.

Legal Counsel to the Board Michael D. Powers informed the Board that this type of proceeding is very similar to any other legal proceeding that the Members are familiar with in their business affairs. He pointed out that any litigation filed in the courts generally takes years to reach a final conclusion, and although this was an administrative proceeding the Board was about to conduct, the parties have similar rights to discovery with the right: to file motions, request subpoenas, and other discovery matters under the regulation governing administrative proceedings. Legal Counsel Powers advised that the Members of Board should take the time to closely review the amended Order to Show Cause, reflect upon it, and then decide whether to approve it.

Board Member Richard Starbard asked Attorney Peary whether he was acting as the prosecutor and Attorney Peary responded in the affirmative.

Chairman Cox suggested that the amended Order to Show Cause be placed on the Board's agenda for the next meeting. Board Member Starbard responded that this has gone on long enough, and made a motion that the Board consider moving forward with the amended Order to Show Cause with a second to the motion by Board Member Johnson, and the vote passed by a vote of: 3-1 with Board Member Coyne opposed. Chairman Cox said that he understood the vote taken by the Board was a vote to end the discussion on the matter, and he would move to the substantive issue whether to adopt the amended Order to Show Cause submitted by Attorney Peary. Before taking a vote on adopting the amended Order to Show Cause, Chairman Cox said that the Board would take a brief recess and read the amended Order to Show Cause. Thereupon a short recess was taken, the Board Members remained in the meeting room, they read the amended Order to Show Cause for several minutes, and after the Members of the Board completed reading it Chairman Cox called the meeting back to order.

Board Member Johnson declared that after considering what Legal Counsel Powers said, he decided to submit a motion to table the amended Order to Show Cause and place it on the agenda at the next Board meeting. The motion was made by Board Member Johnson, seconded by Board Member Joseph Coyne, and the motion carried by a vote of: 4-0 with Chairman Cox abstaining. The amended order to Show Cause will be placed on the agenda for the next meeting of the Board.

Board Member Johnson asked Legal Counsel Powers about the status of the related complaint that was filed against a Hanover Insurance Company's appraiser, Complaint 2016-5. Legal Counsel Powers responded that the disposition of the Order to Show Cause pending before the Board could have an impact on Complaint 2016-5 because if there is a finding rendered against the appraiser in the Order to Show Cause, then that could affect any potential penalty that may arise from Complaint 2016-5. Consequently, Legal Counsel Powers felt that it was best to proceed with the Order to Show Cause first before beginning an administrative hearing on Complaint 2016-5.

Other business – reserved for matters the Chair did not reasonably anticipate at the time of the posting of the meeting and agenda:

Board Member Coyne asserted that he was provided with a document that indicated an out of state company was conducting appraisal business in Massachusetts in violation of the ADALB's regulation, 212 CMR 2.00 et seq. The company apparently is doing business from Atlanta, Georgia, conducting business in Massachusetts under the name of "Access", and acts as the middle company between Massachusetts Insurance Companies by doing sub-appraisals with consumers on behalf of at least one Massachusetts Insurance Company. Board Member Coyne asserted that this type of activity of using unlicensed motor vehicle damage appraisers from out of state as middle-men between Massachusetts Insurance Companies and consumers is a recent development, and he expressed concern that such unauthorized and unlawful activity is on the up-swing. The activity Access engages in while conducting appraisals apparently is violating the law in several ways that it conducts business in Massachusetts such as: directly communicating with consumers and instructing consumers to take photographs of damaged vehicles regardless of the amount of damage to the vehicles or the impairment to the safe operation of the vehicles, instructing consumers to email the pictures to Access employees who are unlicensed along with an estimate of damage, and negotiating the settlement of claims. Access employees, working from Georgia, perform desk appraisals and, to Board Member Coyne's knowledge, are not

licensed in Massachusetts and are appraising motor vehicle damage claims from the photographs submitted by consumers. After appraising the claims they are also adjusting the damage claims. Board Member Coyne opined that the Massachusetts Insurance Companies using Access as a middle-man to do business in Massachusetts are just as guilty of violating the Massachusetts motor vehicle damage appraisal laws as Access. Board Member Coyne provided the other Members of the Board with a document that was apparently created by Access that instructs consumers to take photographs of the damage to their motor vehicles, how to take the photographs of the damage to their motor vehicles, and, thereafter, email the pictures to Access.

Board Member Coyne asserted that he would like the Board to consider action that could be taken against Access and/or the Massachusetts Insurance Companies that are working through Access for appraisal of damage claims and settlements.

Board Member Starbard suggested that the Board send a letter to Access informing them that the conduct of their company has been brought to the Board's attention, such conduct by the company is violating the ADALB regulation, Massachusetts state law, and a copy of the ADALB's regulation 212 CMR 2.00 et seq.

Chairman Cox queried, what would the next step be, send a copy of the letter to the Commissioner of the Division of Insurance?

Attorney Gallagher was given permission to speak and he opined that the Office of the Attorney General has a Consumer Protection Division and they would be best suited to handle such a matter because they have enforcement authority to back them up.

Chairman Cox responded that there still remain the question, what would be the end step?

Board Member Johnson suggested that the proposed letter contain language about the legal requirement that any motor vehicle damage in excess of \$1,500, minus the deductible, requires a written appraisal by a motor vehicle damage appraiser licensed in Massachusetts.

Board Member Coyne rejoined that Access is an independent company and should be instructed to cease and desist from such wrongful conduct in Massachusetts.

Chairman Cox replied by asking, what is the end result? He observed that the company could thumb its nose at the ADALB, and what is needed is enforcement authority. He concluded by querying, if the Board were to approve a letter, where would we send it?

Board Member Coyne volunteered that he would conduct an inquiry into the Insurance Companies that may be involved with Access, and he would draft a letter for the Board's review at the following meeting of the Board.

Chairman Cox announced that the matter would be tabled until the next meeting of the Board.

Request of Rachel Priest, MAPFRE Rhode Island licensed motor vehicle damage appraiser, to waive the work experience and course requirements to take the examination for motor vehicle damage appraiser license:

Pete Smith of MAPFRE Insurance Company informed the Board that he knew Ms. Priest, had worked with her in the past, and he felt she had excellent prior work experience that would meet the requirements in the application process for motor vehicle damage appraiser license.

Board Member Coyne made a motion to waive the requirement for taking the motor vehicle damage appraiser course and work experience requirements, the motion was seconded by Richard Starbard, and the motion passed by a vote of: 4-0 with Chairman Cox abstaining.

Board Member Richard Starbard announced that at the Board meeting held last month the Board was provided with an excellent presentation on the use of diagnostic tools during the course of the repair process of damaged motor vehicles by Jake Rodenroth, of AsTech Collision Diagnostic Services. Board Member Starbard opined, as a Board we should ensure that the industry is engaged with training in these diagnostic tools.

Board Member Coyne reaffirmed his objection, he made at the previous board meeting, about the Board entertaining these types of discussions about the use of diagnostic tools, because the Board lacks any jurisdiction of the subject matter. Mr. Coyne did not see any problem within the auto body industry comprehending the methods and means of the use of these diagnostic tools.

Board Member Starbard replied that automotive manufacturers are sending emails to consumers informing consumers that codes in their motor vehicles have been tripped, after their motor vehicles have been properly repaired by their auto body shops. The problem, as Board Member Starbard viewed it, is that motor vehicle technology is undergoing a substantial change, cars have more complicated computer technology than ever before, probably more computer technology than the original Space Shuttle.

Board Member Coyne reiterated his position that he had not observed a big problem in the industry.

Board Member Starbard retorted that as a matter of standard business practice his auto body shop pre-scans every damaged motor vehicle coming into his shop before any repairs are performed. Board Member Starbard noted that, all cars should be pre-scanned before performing any repairs and post scanned after completion of repairs or customers will invariably receive text messages or emails from automotive manufacturers notifying them that damage codes have been tripped in their motor vehicles and that they must be repaired. This does not reflect well over all on the auto body industry. Failure by an insurance company to allow for pre-scan and post scan diagnostics is a violation of the ADALB regulation requiring the proper preparation of motor vehicle damage reports or appraisals.

Board Member Coyne rejoined that the Board has a fundamental duty of protecting consumers and if the Board were to enforce such a requirement, then the costs to repair motor vehicles will skyrocket and get passed onto consumers through increased insurance premiums. Board

Member Coyne concluded, the Board is not established to protect auto body shops to ensure that auto body shops can make more money while repairing damaged motor vehicles.

Chairman Cox ended the discussion by thanking Board Member Starbard for bringing up the issue.

Board Member Johnson brought up an Advisory Ruling that had been raised at the previous Board meeting in January, which addresses the requirement of a personal inspection of damage to a motor vehicle when an appraiser has viewed pictures or videos and has reason to believe that the damage to the motor vehicle will impair the safe operation of the motor vehicle or violate emission standards. Board Member Johnson reported that he was drafting an Advisory Ruling and he will work with Legal Counsel Powers preparing a final version for presentation to the Board at the next meeting, and he wanted the matter listed on the Board's agenda. Legal Counsel Powers confirmed that the item would be placed on the agenda for the next meeting.

Next Meeting:

The Board determined that the next regularly scheduled Board meeting would be held on April 12, 2017, at 9:30 AM at 1000 Washington Street, Boston, Massachusetts.

Executive session:

Chairman Cox made the following statement:

The Board is about to enter the executive session to review and discuss the background of applicants for motor vehicle damage appraiser test who have disclosed a criminal conviction on the application. Review and discussion of Complaint 2016-11 and Complaint 2017-3 filed against motor vehicle damage appraisers licensed by the Auto Damage Appraiser Licensing Board. Such discussions during the executive session are allowed for under M.G.L. c. 30A, §21 (a)(1) and in accordance with the Office of the Attorney General's Open Meeting Law (OML) decisions such as *Board of Registration in Pharmacy Matter*, OML 2013-58, and *Department of Public Safety Board of Appeals Matter*, OML 2013-104. Section 21 (a) states "A public body may meet in executive session only for the following purposes:

- (1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the

session be open. If an executive session is held, such individual shall have the following rights:

- i. to be present at such executive session during deliberations which involve that individual;
- ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
- iii. to speak on his own behalf; and
- iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

The licensed appraisers' attorneys have requested these matters be heard in the executive session. At the previous Board meeting the licensed appraisers and their attorneys agreed to attempt mediation with the complainant's and report whether mediation was successful.

Chairman Cox called for a roll-call vote to enter the executive session which included the announcement that the Board would adjourn in the executive session. The motion to enter the executive session and adjourn in the executive session was made by Board Member Johnson and seconded by Board Member Coyne, the motion passed by a roll-call vote of: 4-0 with Chairman Cox abstaining.

Executive Session:

Steven Zavackis informed the Board that there were no applicants present for the Board meeting who disclosed a criminal conviction on the application to take the examinations for motor vehicle damage appraiser license.

Complaints 2016-11, 2017-3:

Complaint 2016-11

At the previous Board meeting Attorney Samantha Friedman, a specialist in insurance laws, from the GEICO Insurance Company agreed to mediate the matter with Board Member Joseph Coyne. Board Member Coyne reported that the mediation efforts with the complainant, Attorney Freidman, and himself were successful, and he would report back at the following Board meeting with the final results of the mediation.

Complaint 2017-3

The Board requested the licensed appraiser and his attorney, the renowned Thomas J. Kiley an expert in insurance laws, and various other subject matters legal and non-legal, appeared at the executive session.

Before any discussion began, Board Member Joseph Coyne informed the Board that Attorney Kiley represented him in a legal matter which successfully concluded two years ago. Because of the excellent result reached in that legal matter, if he were in need of future legal representation Board Member Coyne declared that he would retain Attorney Kiley again. Consequently, Board Member Coyne announced that he was recusing himself from deliberating on the matter and exited the Board meeting.

Thereupon the Members of the Board reviewed the complaint and posed several questions to the licensed appraiser, with the appraiser responding to each and every question that was asked.

Board Member Starbard questioned the appraiser, who is employed by an insurance company, as to why negotiations were not undertaken between the complaining appraiser employed with the auto body shop and the insurance company. The appraiser responded that the auto body shop appraiser ended the negotiations by making an ultimatum that his insurance company pay \$48 per hour for paint and materials, take it or leave it and, thereby, unilaterally ended the negotiations. Moreover, the appraiser from the auto body shop demanded a set-price for the geographical area of New Hampshire and as a matter of course his insurance company takes various geographical areas in Massachusetts, gets several quotes from several auto body shops, and determines the most competitive price in that geographical area. After the auto body shop appraiser made her demand, the insurance company appraiser contacted other auto body shops in that geographical area, which was located on the border of Massachusetts and New Hampshire, and found substantially lower hourly rates for paint and materials of \$38. Moreover, the ultimatum that was made by the auto body shop appraiser was for the rate set in the state of New Hampshire and not a rate from Massachusetts.

Attorney Kiley requested permission to speak, and permission was granted by Chairman Cox. Attorney Kiley directed the Board's attention to the fact that the complaint filed against his client was based on a motor vehicle damage appraisal by "an appraiser in-training" who apparently was unlicensed. Consequently, the complaint was insufficient as a matter of law, and, therefore, the complaint filed by the unlicensed appraiser who appraised the damage for the auto body shop was deficient *ab initio*. The first essential element of the *corpus delicti* for such a violation of the Board's regulation requires an appraisal by a licensed appraiser. "212 CMR 2.02 (1) Requirement That License Be Obtained and Displayed. No person in Massachusetts shall appraise or estimate damages to motor vehicles or otherwise present himself or herself as an appraiser unless he or she has first obtained a license from the Auto Damage Appraiser Licensing Board...." Based on the undisputed facts of the complaint, the complaint lacks this essential element, an appraisal by a licensed appraiser, required to establish a *prima facie* case for the violation of the Board's regulation, and, therefore, the complaint must be dismissed.

Legal Counsel Powers provided a CLARIS report from the licensing data system of the Division of Insurance on the "appraiser in-training" named in the complaint. The CLARIS report disclosed that the "appraiser in-training" had taken the Part-II examination in 2015, failed the examination, had not retaken it, and was in fact unlicensed.

A few additional questions were asked of the insurance company's appraiser and all were responded to. At the conclusion of the question and answer session between the licensed

appraiser and the Members of the Board, Attorney Kiley adeptly and succinctly summarized the case concluding, based upon the uncontroverted evidence the Board could only reach the ineluctable conclusion that his client had done nothing that would violate the Board's enabling legislation or regulation.

After the review of the facts contained in the complaint, the responses from the licensed appraiser, and the adept summation of the facts and the law by Attorney Kiley, the consensus of the Board was the complaint contained insufficient facts to support a violation of the motor vehicle damage appraiser laws.

Board Member Johnson made a motion to dismiss the complaint, and the motion was seconded by Board Member Pare, the motion passed by a vote of: 2-1, Board Member Starbard voted against and Chairman Cox abstained with Board Member Coyne absent from the meeting room having recused himself from participating in the deliberations in any manner.

Motion to adjourn:

Board Member Coyne rejoined the meeting. Board Member Coyne made a motion to adjourn which was seconded by Board Member Starbard, the motion passed by a vote of: 3-0, with Chairman Cox abstaining.

Whereupon, the Board's business was concluded.

The form of these minutes comports with the requirements of M.G.L. c. 30A, §22(a).

List of Documents provided at the Meeting:

- 1.) Amended Order to Show Cause submitted by Attorney Scott Peary.
- 2.) Letter from Chairman Cox to the General Counsel for the Division of Insurance.
- 3.) Documents from Access.

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AUTO DAMAGE APPRAISER LICENSING BOARD**

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March 1, 2017

Rachel Davison General Counsel
Division of Insurance
1000 Washington Street
Boston, MA 02118

Re: Status of the Review of Proposed Amendments to the Auto Damage Appraiser Licensing Board's Regulation, 212 CMR 2.00 et seq.

Dear General Counsel Davison:

The Members of the Auto Damage Appraiser Licensing Board (ADALB or Board) respectfully request an update on the status of the review of the proposed amendments to the ADALB's regulation, 212 CMR 2.00 et seq., as voted by the Board at the meeting held on October 4, 2016.

Thank you for your attention to this matter.

Sincerely yours,

Gilbert W. Cox Jr.
Chairman
Auto Damage Appraiser Licensing Board